

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

GIANT EAGLE, INC.

and

Case 06-CA-188991

**UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION,
LOCAL 23 CLC**

**GIANT EAGLE, INC.'S EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER**

On March 14, 2018, Administrative Law Judge ("ALJ") David I. Goldman issued a Decision and Order in the above caption case, finding that Giant Eagle, Inc. ("Giant Eagle") committed certain unfair labor practices under Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1). Pursuant to Section 102.46 of the NLRB Rules and Regulations, Giant Eagle hereby takes exception to the following factual findings, legal conclusions, and remedies, contained in the Administrative Law Judge's Decision ("ALJD"):¹

Exceptions Applicable to the ALJ's Introduction (ALJD at 1-2):²

1. The ALJ's statement that Giant Eagle announced that it "would not consider the employee for the promotion unless employees obtained a waiver" is contrary to the evidence at trial, which established that Giant Eagle proceeded with the employee's application notwithstanding the lack of waivers. *ALJD* at 1, L 8-10.

2. The ALJ's statement that Giant Eagle "refused to provide the advance wage and health care information until after the election and blamed the union" without waivers is inaccurate. *ALJD* at 2, L 1-2. The information was scheduled to be provided after the election,

¹ The specific ground for each exception is set forth in Giant Eagle's supporting brief.

² The headings and subheadings provided herein are merely for ease of reference and do not qualify or limit the scope of the exceptions.

and the employees requested the information on an accelerated basis before the election. Giant Eagle sought the waivers in order to lawfully comply with the employees' request.

3. The ALJ's statement that Giant Eagle's actions constituted an "unlawful threat of a retaliatory change in promotion procedures based on employees having filed a union representation petition." *ALJD* at 2, L 18-20. This statement is beyond the scope of General Counsel's Complaint, unsupported by the record, and contrary to the ALJ's rulings and comments at trial. Giant Eagle was not given a fair opportunity to litigate this issue.

Exceptions Applicable to the ALJ's Findings of Fact (ALJD at 3-11):

4. The ALJ's statement that counsel for Giant Eagle began "attacking" and "criticizing" the Union. *ALJD* at 5, L 38-45. The ALJ's commentary holds Giant Eagle responsible for protected speech under Section 8(c) of the Act.

5. The ALJ's general factual findings with respect to the wage increase and health benefit waivers fail to mention that Giant Eagle never planned to delay conferral of any benefit, only the information summarizing the benefits. *ALJD* at 7, L 1-5.

6. The ALJ's statement that "the position was not filled until October 20, nearly three weeks after the election." *ALJD* at 7 n.2. The ALJ's emphasis on this fact is inconsistent with his evidentiary rulings at trial that Giant Eagle's evidence in this regard was not relevant to the charges, as filed by General Counsel. *Transcript* at 115-17 (ALJ opining that testimony explaining the reason for the delay in filling the position for which Kelli Murphy applied was not relevant, stating "it feels like you're defending thing that aren't really – you're not being accused of"). Giant Eagle was not given a fair opportunity to litigate this issue.

7. The ALJ's commentary regarding Giant Eagle's disclosure of Kelli Murphy's job application is inconsistent with his ultimate determination that such disclosure is not a violation of the Act. *ALJD* at 9, L 15-19.

8. The ALJ's recitation of the facts relevant to Giant Eagle's pension freeze announcement selectively quotes the relevant documentary evidence that was submitted to the ALJ, which, in its entirety, clearly indicated a company-wide audience. *ALJD* at 11, L 7-30. In particular, the ALJ fails to mention that the materials provided to the employees specified that the change applied to "all non-union" employees and did not impact retirees. *Joint Exhibit 7(b)*.

Exceptions Applicable to the ALJ's Analysis re: Giant Eagle's Health and Wage Benefits Information (*ALJD* at 11-15):

9. The ALJ's conclusion that Giant Eagle's use of waivers was a "calculated" and deceptive "scheme" to undermine the Union in advance of the election. *ALJD* at 11, L 42; *see also ALJD* at 13 n.9 (stating that Giant Eagle's approach was "calculated to directly interfere with the employees' relationship with the union"); *ALJD* at 14, L 1-3 (stating that Giant Eagle "utilized its waiver *scheme* to discredit the Union") (emphasis added); *ALJD* at 15, L 12-15 (stating Giant Eagle's interest was in finding something the employees wanted . . . and crafting a way to blame the Union"). The ALJ's emphasis on Giant Eagle's motives is contrary to the objective standard applicable in Section 8(a)(1) claims, unsupported by the record, beyond the scope of the charges alleged in General Counsel's Complaint, and inconsistent with his evidentiary rulings at trial.

10. The ALJ's conclusion that the Board's decision in *McCormick Longmeadow Stone Co.*, 158 NLRB 1237 (1966)³ is "indistinguishable in any relevant way from the instant case." *ALJD* at 14, L 5-12; *see also ALJD* at 13 n.9; *ALJD* at 14, L 27. For the reasons

³ Giant Eagle is aware that NLRB Rule 102.46(a)(1)(D) prohibits argument and citation of authority in an exceptions document where, as here, a supporting brief is filed. Giant Eagle's citation in Exception No. 10 is solely for the purpose of concisely identifying the legal issue on which the exception is taken. *See Geske & Sons*, 317 NLRB 28, 29 (1995) (providing that a case citation in an exceptions document does not run afoul of the Rule where a citation is the most concise means possible of identifying the legal issue on which exception is taken).

articulated in Giant Eagle’s brief, that case is distinguishable in several important respects that are dispositive in the case *sub judice*.

11. The ALJ’s conclusion that Giant Eagle delayed benefits and then shifted the onus for the postponement to the Union. *ALJD* at 14, L 14-19; *see also ALJD* at 15, L 15-16 (stating “[t]he waivers were a device to place the onus on the Union for Giant Eagle’s withholding of this benefit”). Giant Eagle never delayed or withheld wage increases, health benefits, or any other substantive benefit.

12. The ALJ’s conclusion that information summarizing a benefit is itself a benefit. *ALJD* at 14, L 36-38. The ALJ did not cite any precedent in support of his conclusion that information summarizing a benefit is akin to conferral of a substantive benefit.

Exceptions Applicable to the ALJ’s Analysis re: Kelli Murphy Promotion (ALJD at 15-16):

13. The ALJ failed to cite any case law in support of his contention that the Kelli Murphy waiver violated the Act. *See ALJD* at 15-16.

14. The ALJ’s conclusion that the Kelli Murphy waiver “let employees know that a new and discriminatory requirement for the promotion was being imposed on Murphy in retaliation for employees having filed a union representation petition.” *ALJD* at 15, L 27-29. The ALJ’s emphasis on Giant Eagle’s motives is contrary to the objective standard applicable in Section 8(a)(1) claims, unsupported by the record, beyond the scope of the charges alleged in General Counsel’s Complaint, and inconsistent with his evidentiary rulings at trial. Giant Eagle was not given a fair opportunity to litigate this issue.

15. The ALJ’s conclusion that Giant Eagle adopted a “discriminatory approach to job promotions.” *ALJD* at 16, L 14-15. General Counsel never alleged a discriminatory hiring practices under Section 8(a)(3) of the Act, and there is no evidence to support the ALJ’s conclusion.

16. The ALJ's statements that the "'dilemma' Giant Eagle claims motivated it to devise the Murphy waiver appears to have been wholly avoidable, if not invented" and that "it seems likely that waiver demand was a fig leaf – an excuse – to justify Giant Eagle's enthusiastic rush to disclose to employees that the employee who instigated the union election was trying to leave the unit." *ALJD* at 16, L 17-18. The ALJ's emphasis on Giant Eagle's motives is contrary to the objective standard applicable in Section 8(a)(1) claims, unsupported by the record, beyond the scope of the charges alleged in General Counsel's Complaint, and inconsistent with the ALJ's evidentiary rulings at trial. Giant Eagle was not given a fair opportunity to litigate this issue.

17. The ALJ's reliance upon the fact that Giant Eagle "did not hire anyone for the position until three weeks after the election." *ALJD* at 16, L 24-25. The ALJ's emphasis on this fact is inconsistent with his evidentiary rulings at trial that Giant Eagle's evidence in this regard was not relevant to the charges, as filed by General Counsel. *Transcript* at 115-17 (ALJ opining that testimony explaining the reason for the delay in filling the position for which Kelli Murphy applied was not relevant, stating "it feels like you're defending thing that aren't really – you're not being accused of"). Giant Eagle was not given a fair opportunity to litigate this issue.

18. The ALJ's comment that Giant Eagle "crated" the dilemma to "justify publicizing Murphy's Job application" is inconsistent with his ruling that disclosure of the application was not unlawful and with his evidentiary rulings at trial that Giant Eagle's motive was not relevant. *ALJD* at 16, L 25-26.

Exceptions Applicable to the ALJ's Analysis re: Giant Eagle's Pension Freeze Announcement (ALJD 17-18):

19. The ALJ's conclusion that Giant Eagle's post-election pension freeze announcement violated Section 8(a)(1) violated the Act because an employee could reasonably

conclude that the announcement was in retaliation for the employees' decision to join the Union. *ALJD* at 17, L 27-30. The ALJ's conclusion is contrary to the record and to established Board precedent.

20. The ALJ's conclusion, without citation, that Giant Eagle's post-election pension freeze announcement was analogous to a unilateral change in benefits during a representation election. *ALJD* at 18 n.14. The ALJ ignored established board precedent regarding an employer's change in benefits once a union is certified.

Exceptions Applicable to the ALJ's Conclusions of Law (*ALJD* at 18):

21. The ALJ's conclusion of law that Giant Eagle violated Section 8(a)(1) of the Act by "conditioning the preelection disclosure of details about upcoming wage and benefits changes on the employees seeking and securing a waiver from the Union of the right to file charges or objections over the preelection disclosure of information." *ALJD* at 18, L 11. The ALJ's conclusion is contrary to the facts and the law.

22. ALJ's conclusion of law that Giant Eagle violated Section 8(a)(1) of the Act by "announcing that it was conditioning consideration of the application of an employee for a promotion on the employees seeking and securing a waiver from the Union of the right to file charges or objections in the event the employee was granted the promotion." *ALJD* at 18, L 16. The ALJ's conclusion is contrary to the facts and the law.

23. The ALJ's conclusion of law that Giant Eagle violated Section 8(a)(1) of the Act by "announcing unilateral changes in retirement benefits to employees." *ALJD* at 18, L 21. The ALJ's conclusion is contrary to the facts and the law.

Exceptions Applicable to the ALJ's Remedy (*ALJD* at 18-19):

24. The ALJ's remedy that Giant Eagle must take affirmative action designed to effectuate the policies of the Act by posting a notice at its facilities for 60 days. *ALJD* at 18, L

29-36. Because Giant Eagle did not commit any unfair labor practices, there is no need for such a remedy.

Exceptions Applicable ALJ's Order (ALJD at 19-20):

25. The ALJ's Order that Giant Eagle shall cease and desist from certain activities. ALJD at 19, L 15-34. Because Giant Eagle did not commit any unfair labor practices, there is no need for such an order.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Susan Grooms Kaplan", is written over a horizontal line.

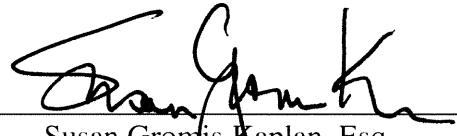
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STATEMENT OF SERVICE

I hereby certify that on April 11, 2018, a true and correct copy of **Giant Eagle's Exceptions to the Administrative Law Judge's Decision and Order** was electronically filed with the NLRB through its website at www.nlr.gov. Additionally, a copy was served via email to the following:

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